***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S REPLY BRIEF

74-1096

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| JOSEPH DE LORRAINE, Plaintiff-Appellant -against- MEBA PENSION TRUST, Representing the National Marine Engineers' Beneficial Association, and MILDRED E. KILLOUGH, Individually and in her capacity as Adminstrator of the MEBA Pension Trust, Defendants-Appellees | : | APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK |

APPELLANT'S REPLY BRIEF


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## PRELIMINARY STATEMENT

The Statement of Issues Presented and the Statement of the Case are contained in the Appellant's main brief.

## POINT I

### THE STATE AGENCY PROCEEDINGS DID NOT DEAL WITH THE MERITS OF THE EMPLOYEE'S CLAIM.

The pension trustees contend in their brief (pp. 11-12) that the New York State agency proceedings resulted in a finding of no probable cause and lack of evidence of discrimination. In fact, the controlling factor in the state proceedings, found in the decision of the New York State Human Rights Appeal Board, is as follows:

> "...(T)he pertinent section on age discrimination (296.3-a) applicable to the Pension System administered by respondents here was enacted after the inception of MEBA retirement system in 1955, and as a matter of law, the subject retirement system is exempted from coverage of the Human Rights Law." (A-37)

Any other statements or comments by the State agency are gratuitous and dicta, and should not affect the considerations of the employee's claim in this Court.

## POINT 2

### THE BETTER REASONED DECISIONS INDICATE A LIBERAL INTERPRETATION OF FEDERAL JURISDICTION OVER TAFT-HARTLEY ACT PENSION CLAIMS.

The Pension Trustees contend that the question of Federal Court jurisdiction over disputes under the Taft-Hartley Act is a simple one which has been well settled in favor of the narrow view (Appellees' Brief, pp. 14ff). In fact, the question is far from settled, and important policy considerations dictate a liberal and expanding approach to this difficult problem.

Bowers v. Ulpiano Casal Inc., 393 F 2d 421 (1st Cir 1968), (Appellees' Brief, p. 14) dealt with the narrow question of federal jurisdiction over claimed imprudent use of fund monies by the pension trustees in violation of their fiduciary duties. Id at page 423. This kind of question is clearly a matter for the state courts under any of the rules heretofore put forward in decided cases. The policy behind the adoption of a federal common law approach to this area is strong and persuasive (see Thompson, 9 Textbook for Welfare, Pension Trustees and Administrators, 440, 443 [1967], but, thus far, courts faced with the problem have concluded that,

> "Without guidance by the Supreme Court we do not have authority to establish such a federal common law for union-management negotiated pension fund agreements. We are not required, however, to ignore the consequences of pension fund disruptions on federal interests in labor-management relations."

Crawford v. Cianciulli, 357 F Supp 357 (ED Pa 1973), at page 361.

The legislative history in this regard is ambiguous and "...necessarily ... lacking in conclusiveness." Employing Plasterers' Association of Chicago v. Journeymen Plasters' Protective & Benevolent Society of Chicago, 279 F 2d 92 (7th Cir 1960), at page 99, quoting Copra v. Suro 236 F 2d 107 (1st Cir 1956). Accordingly the Pension Trustees' reliance thereon at page 17 of their brief is not apposite.

The application of the principles of labor law indicates support for the continued development of a federal body of common law in cases involving attacks against the structure and eligibility requirements of a Taft-Hartley Act pension fund. Moses v. Ammond, 162 F Supp 866 (SD NY 1958), quoted extensively by the trustees (pp. 20-21 of their brief) is no longer valid authority. In deciding that case, Judge Palmieri believed (as did many in 1957) that §301 of the Taft-Hartley Act was merely a procedural grant to federal courts, allowing them to apply local common law. This approach, espoused

in such cases as Sinclair Refining Co. v. Atkinson, 370 US 195 (1962), has been overruled by the decision in Boys Market, Inc. v. Retail Clerks Local 770, 398 US 235 (1970), which reaffirms the principle that federal courts have the authority and the responsibility of fashioning and enforcing a federal common law of labor relations. Id, at page 242.

This approach is indicated by the national scope of these pension funds, the wide range of their application, and by Congressional concern with the fair and proper operation of these pension funds. As the Supreme Court has observed:

> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See Clearfield Trust Co. v. United States, 318 US 363, 366-367...National Metropolitan Bank v. United States, 323 US 454..."

Textile Workers Union v. Lincoln Mills of Alabama, 353 US 448 (1957) at 457. This approach is not inconsistent with that set forth in Bowers v. Ulpiano Casals, Co, supra. That case was explicitly recognized by Judge Bartels in Sanchez Lugo v. The Employees Retirement Fund of the Illumination Products Industry, 366 F Supp 99 (1973) and found not be be controlling in situations involving alleged structural violations. Id at page 103.

The plaintiff here alleges that the structure and operation of this retirement fund are fundamentally designed to meet the fluctuation in demand for workers by forcing out older workers and opening up their jobs

for newcomers. This purpose, which may be entirely acceptable if done by a union or by an employer, is flatly in violation of the Taft-Hartley Act when done by a Pension Fund and its Trustees, because it is not for the benefit of the employees.

Parenthetically, it should be noted that, contrary to the indication of the footnote to page 28 of the appellees' brief, current bills before Congress do not include provisions for general federal court jurisdiction over pension plans. These bills deal with vesting, portability, and disclosure, and to some extent with fiscal integrity and plan failures. They do not attack problems such as are presented here.

The employee is not seeking to establish federal jurisdiction over claims that the trustees are acting imprudently in making fund investments or in otherwise discharging their duties in indivudal cases. Plaintiff is asserting that trustee actions which fundamentally affect and alter the eligibility structure to exclude workers for reasons other than the benefit of the employees should be reviewed and corrected by the federal courts under federal common law principles.

## POINT 3

### THE PENSION TRUSTEES ARE SUBJECT TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

The Pension Trustees continue to argue on the basis of what they should have done instead of what they did in fact, and thus beg the question which is the foundation of this law suit. They claim (appellee's brief, page 32):

> "The trustees' sole function is to administer a pension fund and establish regulations which determine eligibility for pensions."

This is a fair statement of what the pension trustees are supposed to do. However, the plaintiff has alleged in his complaint that the trustees in fact acted as agents of the union by changing retirement regulations, not to improve the plan for the benefit of the employees, but rather to serve the purposes of the union, particularly the decrease in older workers in favor of apprentices and younger workers who would pay high initiation fees, attend the Joseph Calhoon School, and not be interested in retirement benefits, which were becoming an expensive and troublesome problem. See allegations in the complaint (A-8, A-9); the amended complaint (A-94); statement of union president Joseph Calhoon (A-85); affidavit of E. Judson Jennings, (A-102, 103).

This claim is based upon well established principles of common law relating to agency. An agent is defined in 2A CJS Agency §4(c) as:

> "[O]ne who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it."

In evaluating the plaintiff's claim of agency, this court should examine the facts, not the labels. Despite the repeated claims of independence and autonomy, the fact remains that there is a substantial identity between the union officers and the union representatives on the board of trustees of the pension fund. Under these circumstances, this court should look behind the facade to the reality of the situation. This is precisely the approach utilized recently by the district court in Chastang v. Flynn & Emrich Co, 365 F Supp 957 (D Md 1973), upholding federal jurisdiction under Title VII of the Civil Rights Act of 1964, 42 USC §2000(e) et seq. Title VII is the model upon which the Age Discrimination legislation was based, and specifically resembles it in many respects. See Freed, "The Age Discrimination In Employment Act of 1967," National Clearinghouse Review, August, 1972, p. 196. The Age Discrimination in Employment Act, like Title VII of the Civil Rights Act, the National Labor Relations Act's §8, 29 USC §158, and the Fair Labor Standards Act, 29 USC §215(a)(3), is remedial in nature

and should be liberally construed in favor of the Act's beneficiaries See in general Pettway v. American Cast Iron Pipe Co, 411 F 2d 998, 1005-06 (5th Cir 1969). Thus, cases like those cited above, and Local No. 2 v. Paramount Plastering Co, Inc, 310 F 2d 179 (9th Cir 1962), cert denied 372 US 944 (1963) [appellees' brief, p. 33 fn], should be read in terms of the policy and general approach they espouse, and should be applied to the case at bar.

The pension trustess should not be allowed to act in a manner inconsistent with federal law and then defeat a claim based on what they should have done had they acted properly.

## POINT 4

### SUMMARY JUDGMENT WAS INAPPROPRIATELY GRANTED IN THIS CASE.

The pension trustees rely heavily upon the decision of this court in Donnelly v. Guion, 467 F 2d 290 (2d Cir 1972). In that case, the plaintiff opposed the motion for summary judgment on the crucial issue with only a doctor's affidavit containing purely conclusory statements. Recognizing that

> "Unmistakably, summary judgment is a drastic device because its prophylactic function, when exercised, cuts off a party's right to present his case to the jury," Id at p. 291

the court held that the plaintiff had not shown the existence of facts to support her claim. The court also expressly considered and rejected the possibility that the facts might support different inferences. Id, at page 294. In the case at bar, the employee has raised serious questions about the motives behind the conduct of the trustees, and shown a clear need to have thorough pre-trial discovery, including, but not limited to, an examination of the union president, Joseph Calhoon, and of the pension fund records to obtain knowledge peculiarly in the possession of the defendants.

## POINT 5

### THE DEFENDANTS' POLICIES DO NOT COME WITHIN THE GOOD FAITH RETIREMENT PLAN EXCEPTION TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The trustees have argued that the plaintiff cannot complain about the structure and operation of the plan because he retired voluntarily the first time he stopped working. (Appellees' brief, p. 35). This overlooks the crucial point that when the plaintiff stopped working the first time, there was a full "swinging door" policy in effect, that he obtained permission to return to work and that he did work for a substantial period of time when the policy was changed to retroactively revoke an authorization previously given. Any plan which forces a man out of work unwillingly at age fifty when he is in good health is extremely suspect. The Age Discrimination in Employment Act of 1967 was directed primarily at preventing discriminatory hiring practices, and the retirement plan exception was directed at permitting retirement at normal ages, most typically 65, and at permitting employers to refuse to add new, older employees to a plan when the effect would be to substantially increase the cost of the plan. It does not excuse the actions here complained of.

## POINT 6

THIS CLAIM IS NOT TIME BARRED.

The plaintiff was formally retired from employment under duress in February, 1972. He filed his notice of intent to sue with the Secretary of Labor on July 19, 1972, as required by the statute. See the complaint (A-8); see 29 USC §§626 and 633. Plaintiff's claim was filed within 180 days in a jurisdiction where the state agency had no jurisdiction (see Point 2, supra). His substantial rights should not be impaired, particularly in view of the fact that the defendants can hardly with justice claim that they are 'surprised' by the plaintiff's action to contest their regulations. In addition, the plaintiff's claim in this case is based upon a continuing course of action, which continues to the present. He is ready, willing, and able to resume his former position at any time. The plan continues in full force and effect, as does the particular resolution which keeps plaintiff out of his old job. Mr. DeLorraine has repeatedly refused offers of employment within the maritime industry and for the Port of New York Authority because of the prohibition which continues to inhibit his right to work. Such continuing practices preserve the plaintiff's right of action. Belt v. Johnson Motor Lines, 458 F 2d 443 (5th Cir 1972); Bartmess v. Drewrys USA Inc,

444 F 2d 1186 (7th Cir 1971) cert denied 404 US 939 F 2d 289 (7th Cir 1969). As stated by the court in the Bartmess case,

> "Appellees...contend that the only potentially unlawful practice under retirement plan is the actual discharge and not the overall maintenance of the plan. We disagree. We have no difficulty in concluding that the actual maintenance of a discriminatory retirement plan can be one of the acts which 'adversely affects (an individual's) status as an employee...' and that retirement plans should be viewed as 'conditions of employment' within the meaning of (42 USC §2000-e)." At page 1188.

The procedural aspects of the Age Discrimination in Employment Act of 1967 are complex and confusing, and are closely modeled upon the parallel sections of Title VII of the Civil Rights Act, as pointed out above. Although there has been little litigation under the Age Discrimination Act, there have been repeated attempts by defendants in Title VII cases to frustrate the substative rights of victims of discrimination, based on technicalities. The United States Supreme Court, in Love v. Pullman Co, 404 US 522 (1972) has set a liberal standard in the application of these discrimination statutes. In that case the Court ruled that a prematurely filed notice to the Equal Employment Opportunity Commission was automatically validated upon the termination of state agency proceedings. See also Bartmess v.

Drewrys USA Inc; Rosen v. Public Service Electric Co, 328 F Supp 454 (D NJ 1971); Ugiansky v. Flynn & Emrich Co, 337 F Supp 807 (D Md 1972); Malone v. North American Rockwell Corporation, 457 F 2d 779 (9th Cir 1972); and Vigil v. American Tel & Tel Co, 455 F 2d 1222 (10th Cir 1972).

In this case, Joseph DeLorraine hotly contested the change in regulations from the outset. He sought assistance from the union through its grievance procedures. See Culpepper v. Reynolds Metals Co, 421 F 2d 888 (5th Cir 1970).

It would be a miscarriage of justice indeed if the plaintiff's rights in this case could be frustrated on this techinicality.

## CONCLUSION

The judgment of the District Court should be reversed and this action remanded for trial.

Dated: April 29, 1974.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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| JOSEPH DE LORRAINE,<br><br>Plaintiff-Appellant,<br><br>-against-<br><br>MEBA PENSION TRUST, et al.,<br><br>Defendants-Appellees | AFFIDAVIT OF SERVICE BY MAIL<br><br>Index No. 74-1096 |

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

LAURA VILLAFANE, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18 years of age and resides at 316 West 94th Street, NYC.

That on the 29th day of April , 1974, deponent served the within Appellant's Reply Brief

upon Proskauer Rose Goetz & Mendelsohn, 300 Park Ave., NYC 10022
Attn: Morton M. Maneker, Robert J. Jossen,

the address designated by said attorney for that purpose by depositing a true copy of same in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Laura Villafane
LAURA VILLAFANE

Sworn to before me this
29th day of April , 1974.

Jonathan A. Weiss

JONATHAN A. WEI
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975